RECEIVED
JUN 19 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 19___

NO. 79-6799

RICHARD MICHAEL MORRIS,

Petitioner,

V.

THE STATE OF GEORGIA,

Respondent,

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Petitioner, RICHARD MICHAEL MORRIS, pursuant to Rule 53 and 18 U.S.C. § 3006A (d) (6), asks leave to file the attached Petition for a Writ of Certiorari to the Court of Appeals of Georgia without pre-payment of cost and to Proceed in Forma Pauperis. Petitioner is incarcerated in the penal system of Georgia and is unable to pay the costs of this proceeding.

Dated: June 18, 1980.

Respectfully submitted,

G. HUGHEL HARRISON
Counsel for Petitioner

STATE OF GEORGIA

COUNTY OF GWINNETT 79-6799

RECEIVED
JUN 19 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT

I, RICHARD MICHAEL MORRIS, of said State and County, on oath depose and state the following:

1.

The following statement is based upon my personal knowledge, and is true.

2.

I am over eighteen (18) years of age and am competent to testify to the matter stated herein.

3.

I am the Petitioner in the case of RICHARD MICHAEL MORRIS versus THE STATE OF GEORGIA, which is presently at a Writ of Certiorari to the Supreme Court of the United States.

4.

Originally, I had retained the counsel of services of G. HUGHEL HARRISON, Attorney at Law, in Lawrenceville, Georgia, to represent me on each and every phase of my court proceedings.

5.

I am presently incarcerated in the Georgia Penal System in Stone Mountain, Georgia.

6.

I am without the financial resources or wherewithal to pay for the filing and the costs of this Writ of Certiorari to the Court of Appeals of Georgia.

7.

At present, I do not have the resources available to me to pay for

the cost of this action and would request that it be filed on my behalf IN FORMA PAUPERIS.

Richard Michael Morris

RICHARD MICHAEL MORRIS

Sworn and Subscribed before me,

this 18th day of June,

1980.

Notary Public

Georgia, State at Large, my commission expires June 8, 1984

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
JUN 19 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

_____ TERM, 19___

NO. 79-6799

RICHARD MICHAEL MORRIS,

Petitioner,

V.

THE STATE OF GEORGIA,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO

THE COURT OF APPEALS STATE OF GEORGIA

G. HUGHEL HARRISON
Post Office Box 88
Lawrenceville, Georgia 30246

RECEIVED
JUN 19 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 19__

79-6799

RICHARD MICHAEL MORRIS,

Petitioner,

V.

THE STATE OF GEORGIA,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO

THE COURT OF APPEALS STATE OF GEORGIA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Georgia entered on February 12, 1980.

CITATION TO OPINION BELOW

The Court of Appeals entered its judgment on February 12, 1980. A copy of the opinion is attached as Exhibit "A". Thereafter, on March 19, 1980, a writ of certiorari was denied in the Supreme Court of Georgia. A copy of said denial is attached as Exhibit "B". Remittiture Order is Exhibit "C".

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the revocation of probation after a single revocation hearing under Ga. Code §27-2713, as applied by WARE V. STATE, 137 Ga. App. 673, 224 S.E. 2d 873 (1976), is in violation of the due process clause of the Fourteenth (14th) Amendment to the Constitution of the United States, as applied in MORRISSEY V. BREWER, 408 U.S. 471; 92 S.Ct 2593; 33 L.Ed 2d 484 (1972); and GAGNON V. SCARPELLI, 411 U.S. 778; 93 S.Ct 1756; 36 L.Ed 2d 656 (1973).

(2) Whether the standard of proof used in probation revocation hearings as has been determined in ALLEN V. STATE, 78 Ga. App. 526; 51 S.E. 2d 571 (1949), that only slight evidence is sufficient to sustain a trial judge's decision to revoke probation, violates due process as contemplated by the Fifth (5th) and Fourteenth (14th) Amendments of the Constitution of the United States.

(3) Whether Ga. Code §27-2713, which requires that the probation revocation hearing be conducted before the court granting such probation, is in violation of the due process requirements as contemplated by the Fourteenth (14th) Amendment of the Constitution of the United States when the case goes before the same judge who presided over the original trial that resulted in the probation of petitioner.

(4) Whether Ga. Code §27-2727, as applied in STATE V. WILEY, 233 Ga. 316; 210 S.E. 2d 790 (1974), which does not allow as a set-off to the sentence imposed at the probation revocation hearing the time petitioner spent on probation under the order and sentence prior to the probation revocation of a first offender's probation, violates the due process and equal protection requirements as contemplated by the Fourteenth (14th) Amendment of Constitution of the United States where Ga. Code §27-2713 grants such credit to persons who are on probation but excludes those persons on probation under the first offender probation statute. Ga. Code §27-2727 - 2732.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) This case involves the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States.

(2) Furthermore, it is reflected in the following provisions of the General Statutes of Georgia; Ga. Code §27-2713; (insofar as applicable here, and as applied by the State of Georgia) provides:

Whenever, within the period of probation, a pro-

bation officer believes that a probationer under his supervision has violated his probation in a material respect, he may arrest such probationer without warrant, wherever found, and return him to the court granting such probation, ... The Court, upon the probationer being brought before it, may commit him or release him with or without bail to await further hearing or it may dismiss the charge. If such charge is not dismissed at this time, the court shall give the probationer an opportunity to be fully heard at the earliest possible date on his own behalf, in person or by counsel: . . . - - - If such probation is revoked, the court may order the execution of the sentence originally imposed, or any portion thereof: Provided, however, that in such event, the time that the defendant has served under probation shall be considered as time served and shall be deducted from and considered a part of the time he was originally sentenced to serve . . . . Ga. Laws 1966 p. 440 amending section 12 of Ga. Laws 1956, p. 27, the Statewide Probation Act.

(3) Another provision of the General Statutes of Georgia involved in the present case is Ga. Code §27-2727 which reads:

> Upon a verdict or plea of guilty or a plea of nolo contendere but before an adjudication of guilt, the court may, in the case of a defendant who has not been previously convicted of a felony, without entering a judgment of guilt and with the consent of the defendant, defer further proceeding and place the defendant on probation as provided by the Statewide Probation Act [§§27-2702 through 27-2726.1] Upon violation of the terms of probation, or upon a conviction for another crime, the court may enter an adjudication of guilt and proceed as otherwise provided. Ga. Laws 1968 p. 324, 325, Criminal Procedure - Probation For First Offenders. (First Offender Probation Statute)

STATEMENT OF CASE

This is a petition for a writ of certiorari to review the judgment of the Georgia Court of Appeals entered in February 12, 1980. Writ of certiorari to the Supreme Court of Georgia was denied on March 19, 1980. This case originated in the Superior Court of Gwinnett County, Georgia, from accusation 78-B-194 and accusation 78-B-195. Petitioner, RICHARD

MICHAEL MORRIS, appellant in case number 58775 in the Court of Appeals of Georgia, entered pleas of guilty to two (2) counts of violation of the Georgia Controlled Substances Act on August 11, 1978, in the Superior Court of Gwinnett County, Georgia. He was sentenced to five (5) years probation on accusation 78-B-194 and to twelve (12) months probation (concurrent) on accusation 78-B-195. Petitioner received first offender treatment under Georgia Code §27-2723 on both counts.

On May 30, 1979, the Gwinnett County Probation Department filed a petition for adjudication of guilt and imposition of sentence on Petitioner's first offender probation, alleging that Petitioner had violated his probation in that he was arrested on May 23, 1979, for violation of the Georgia Controlled Substances Act, involving a sale of cocaine. A single hearing on the petition was held before Judge Reid Merritt of the Gwinnett County Superior Court on June 29, 1979. Judge Reid Merritt presided over the original trial that resulted in the probation of Petitioner in August, 1978. After consideration of the evidence presented, the court adjudged Petitioner guilty of the offenses for which he had been placed on first offender probation, and sentenced Petitioner to serve five (5) years in prison on accusation number 78-B-194 and one (1) year in prison on accusation number 78-B-195. No set-off was given to Petitioner for time spent on probation from August 11, 1978, to June 29, 1979. On the date of the hearing, June 29, 1979, the Petitioner was present with counsel and a full hearing was conducted. The offense listed on the petition for adjudication of guilt and imposition of sentence, was established by evidence, and the Petitioner afforded the right to complete cross-examination. Petitioner enumerates as error the failure of the trial court to afford him a bifurcated hearing, i.e., a preliminary hearing to establish probable cause to conduct a revocation hearing, followed by an evidentiary show cause hearing, before revocation of probation, rather than consolidating the procedure into one

hearing. Petitioner also enumerates as error the standard of proof used in probation revocation hearings. Additionally Petitioner enumerates as error that same probation revocation hearing was conducted before the same court and judge that granted such probation. And, lastly, Petitioner enumerates as error that he was disallowed a set-off from the sentence imposed at the probation revocation hearing of the time Petitioner spent on probation under the order and sentence which put Petitioner on probation in the first instance.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE REVOCATION OF PROBATION AFTER A SINGLE REVOCATION HEARING UNDER GA. CODE §27-2713, AS APPLIED BY WARE V. STATE, 137 GA. APP 673; 224 S.E. 2d 873 (1976), IS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH (14th) AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, AS APPLIED IN MORRISSEY V. BREWER, 408 U.S. 471; 92 S.Ct. 2593; 33 L.Ed 2d 484 (1972), AND GAGNON V. SCARPELLI, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

This issue is of great concern, gravity, and importance to the public because of the many probation revocation proceedings and the effect of the GAGNON, supra, and MORRISSEY, supra, decisions upon the revocation proceeding in Georgia under Ga. Code §27-2713.

Georgia Code § 27-2713, insofar as applicable here, provides;

> ----The Court, upon the probationer being brought before it may commit him or release him with or without bail to await further hearing or may dismiss the charge. If such charge is not dismissed at this time, the court shall give the probationer an opportunity to be fully heard at the earliest possible date on his own behalf, in person or by counsel . . . . Georgia Laws 1966 p. 440 amending section 12 of Georgia Laws 1956 p. 27, the Statewide Probation Act. [Emphasis supplied]

This wording of §27-2713 seems to contemplate a two (2) step proceeding. Any question of whether or not a two (2) step proceeding is necessary for due process to be satisfied would appear to have been settled by the rulings in MORRISSEY V. BREWER, supra, and GAGNON V. SCARPELLI,

supra, which require a two (2) stage proceeding to revoke either parole or probation. Specifically, GAGNON, supra, provided that to meet due process requirements a probationer is entitled to two (2) hearings; a preliminary hearing to determine if there is probable cause to believe that the conditions of probations have been violated, and "a somewhat more comprehensive hearing prior to the making of the final revocation decision." GAGNON V. SCARPELLI, 411 U.S. 778, 782, 93 S. Ct. 1756; 36 L. Ed. 2d 656 (1973). In Georgia, we have provided for a preliminary hearing for parolees under the 1975 Georgia Law page 786, 787, contained in the Ann. Code sup. of 77-518.1.

However, the Georgia Court of Appeals has held in WARE V. STATE, 137 Ga. App. 673, 675; 224 S.E. 2d 873, after recognizing the applicability of the rulings of the United States Supreme Court, that the due process requirements could be satisfied in a single court proceeding. Seizing upon the language in MORRISSEY, supra, stating that, "we cannot write a code of procedure; that is the responsibility of each state . . . . Our task is limited to deciding the minimum requirements of due process", MORRISSEY V. BREWER, 408 U.S. 471; 92 S. Ct. 2593; 33 L. Ed. 2d 484, the Georgia Court of Appeals reasoned, using this language in MORRISSEY, supra, that it was free to write its own code of procedure and ignored the United States Supreme Court's requirement that a two (2) step procedure be used. Without any explanation of its reasoning the WARE court said "since all of these due process requirements can be satisfied in a simple court trial as was done in the instant case, we see no reason for duplication in the form of a preliminary hearing". WARE V. STATE, 137 Ga. App. 673, 675; 224 S.E. 2d 873. In so ruling, the Georgia Court of Appeals has ignored the simple fact that the two (2) step hearing procedure outlined in MORRISSEY, supra, and GAGNON, supra, is the minimum procedure consistent with due process. GAGNON, supra, (411 U.S. 778, 782; 36 L. Ed. 2d 656, 662), states " . . . We hold that a probationer, like a parolee, is entitled to a

preliminary and a final revocation hearing under the conditions specified in MORRISSEY V. BREWER, supra. [Emphasis added].

The Petitioner's revocation was a one (1) step proceeding as authorized in WARE, supra. Yet, WARE, supra, is in direct and inescapable conflict with GAGNON, supra. The conflict is obvious and apparent. The two (2) holdings cannot be reconciled.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE STANDARD OF PROOF USED IN PROBATION REVOCATION HEARINGS, AS HAS BEEN DETERMINED IN ALLEN V. STATE, 78 GA. APP. 526; 51 S.E. 2d 571 (1949), THAT ONLY SLIGHT EVIDENCE IS SUFFICIENT TO SUSTAIN A TRIAL JUDGE'S DECISION TO REVOKE PROBATION, VIOLATES DUE PROCESS AS CONTEMPLATED BY THE FOURTEENTH (14th) AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

In Georgia, the Court of Appeals has long held that, in a probation revocation hearing, only slight evidence is necessary to sustain a trial judge's decision to revoke. The rule is based on dicta in ALLEN V. STATE, supra, which says in full:

> Although the trial court on a hearing for the revocation of probation has wide discretion, and although only slight evidence will support a judgment of revocation, some evidence is required. [Allen, 78 Ga. app. 526, 530.].

The basis of the statement is not really given in ALLEN. Indeed, the language was used in the context of the court's reversal of a lower court's decision to revoke without the support of any evidence at all. In an earlier portion of the case, the court, in referring to the probationer's right of hearing, said, "This right would indeed be rendered impotent if the court be permitted, after hearing the evidence, to revoke the probation on mere suspicion . . . . (Allen 78 Ga. App. 526, 529)". That, however, is exactly what the ALLEN rule does. ALLEN, supra, explicitly says a showing of a break of the probation conditions by a preponderance of the evidence is not necessary (ALLEN V. STATE, 78 Ga. App. 526, 528), but the foregoing statement also shows that the court envisioned a standard of proof higher than what is, in effect, a scintilla rule. Nevertheless, the Georgia Court

of Appeals has consistently followed the ALLEN "rule" since that opinion was announced.

A justification of the use of such a rule is not set out in ALLEN. Subsequent majority opinions merely cite ALLEN, supra, or cases resting on it as authority for use of the rule. However, the dissent by Judge Webb in DICKERSON V. STATE, (136 Ga. App. 885; 222 S.E. 2d 649 (1975), states that the rule rests on the premise that probation is merely a privilege granted a defendant, and so is not subject to due process consideration. But as Judge Webb goes on to say.

> . . . the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege" has now been specifically rejected by the United States Supreme Court . . . . Moreover, the principle . . . that since parole or probation is only a privilege it may be summarily revoked has now been discarded. (id. 136 Ga. App, 885, 888-889).

Judge Webb was, in essence, quoting the United States Supreme Court's decision in GRAHAM V. RICHARDSON, (403 U.S. 365, 374, 29 L. Ed. 2d 534, 543, 91 S. Ct. 1848 [1971]).

The Georgia Court of Appeals has repeatedly said:

> A revocation hearing is not a "trial" to determine the guilt of a probationer for the commission of a misdemeanor or a felony; a hearing of this nature is not a trial on a criminal charge but is one to determine judicially whether the conduct of the probation has conformed to the course outlined in the order of probation; and whether those conditions have been breached is to be determined by the court. JOHNSON V. STATE, 214 Ga. 818, 819; 108 S.E. 2d 313 (1958); quoted: JOHNSON V. STATE, 142 Ga. App. 124; 235 S.E. 2d 550 (1977); DICKERSON V. STATE, 136 Ga. App. 885, 886; 222 S.E. 2d649 (1975).

The court, however, has consistently overlooked the crucial fact that, when, as in the case of the Petitioner, the alleged violation of the conditions of probation is the commission of another crime, the revocation of probation is in its effect punishment for the commission of the second crime. Given the fact that the Court of Appeals has finally recognized a long implied rule that, under the ALLEN standard of proof, an arrest on another charge alone may be sufficient grounds for revocation, WILSON et al V.

STATE; No. 58670 and 58765 (Ga. App. Dec. 4, 1979) Cert denied No. 35940 (Ga. Sup. Ct. Jan 24, 1980); Cert applied for No. 79-6482 (U. S. Supreme Court, April 24, 1980), the potential for abuse is apparent. ABA STANDARDS RELATING TO PROBATION: TENTATIVE DRAFT [1970] commentary §5.3. Assuming that the authorities, even in good faith, suspect a probationer of having committed a crime, they need not go through the mechanism of a formal trial to have that probationer incarcerated. A report of the arrest of the probationer to his probation officer and the production of evidence of the arrest alone are sufficient to put the defendant into prison. Since the evidence of the arrest is deemed sufficient to support a revocation, the only effective defense a probationer can offer is a challenge to the validity of the arrest itself. If the arrest was one made without a warrant but based on probable cause, the task of presenting a defense is hopeless. The officer arresting the defendant need only present his evidence of probable cause to make the arrest. That evidence can then be usbd to sustain the revocation, regardless of the disposition of the second charge.

These are not merely inchoate abuses. In JOHNSON V. STATE, 142 Ga. App. 124; 235 S.E. 2d 550 (1977); affmd, 240 Ga. 526; 242 SE 2d 53 (1977), the defendant was tried on burglary charges and found not guilty, yet had his probation revoked on the basis of the same evidence used to support the indictment in his burglary trial. Similarily, the Petitioner was arrested and indicted for conspiracy to sell cocaine. His probation was revoked on the basis of the arrest. His indictment was subsequently successfully demurred to and was quashed. He was never reindicted, and the question of whether or not he actually entered the alleged conspiracy has never been fully tested in a court of law. He is, in effect, being punished for having commited a crime while on probation, without it having been proved that he actually committed that second crime.

In MORRISSEY V. BREWER, Chief Justice Burger, speaking for the court said:

> The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to a normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the break of parole conditions . . . . And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness. (MORRISSEY, 408 U.S. 471, 484; 33 L.Ed. 2d 484, 496).

The standard of proof before the court is grosaly inequitable. It is, in its effect, a denial of trial by jury. Where, as in Petitioner's case, a District Attorney is presented with a defendant with time left to serve on probation, he need not ever bring the defendant's case to trial to have him imprisoned for the balance of his probated sentence. Indeed, he would be a fool to do so where, as here, he need only prove the fact of arrest to have the defendant's probation revoked. Fundamental fairness would at the very least require that where, as here, a defendant is before the revocation hearing on the grounds that he has committed another crime, the second criminal charge be tried before the final revocation hearing takes place. More important, fundamental fairness would require that more than a mere arrest be shown before a probation revocation is sustained. A mere scintilla of evidence should not be allowed to support the deprivation of a defendant's conditional liberty. Otherwise, the right of hearing is rendered impotent, and a trial court is indeed allowed to revoke probation on nothing more than a scrap of suspicion.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER GA. CODE § 27-2713, WHICH REQUIRES THAT THE PROBATION REVOCATION HEARING BE CONDUCTED BEFORE THE COURT GRANTING SUCH PROBATION, IS IN VIOLATION OF THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH (14th) AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES WHEN THE PROBATIONER IS BROUGHT BEFORE THE SAME JUDGE WHO PRESIDED OVER THE ORIGINAL TRIAL THAT RESULTED IN THE

PETITIONER'S BEING PLACED ON PROBATION.

Georgia Code §27-2713, insofar as applicable here, provides:

> Whenever, within the period of probation, a probation officer believes that a probationer under his supervision has violated his probation in a material respect, he may arrest such probationer without warrant, wherever found, and return him to the court granting such probation, ... Ga. Laws 1966 p. 440 amending section 12 of Ga. Laws 1956 p. 27, the Statewide Probation Act. [Emphasis supplied].

As has been shown, supra, Georgia does not grant a two (2) step revocation procedure to probationers. The one hearing afforded in parole revocation proceedings is asserted to be the functional equivalent to a preliminary hearing to establish probable cause to believe that the arrested probationer has committed acts that would constitute a violation of probation, and an evidentary show cause hearing which can result in probation revocation, or in any case the disposition of the probationer's case. In considering the preliminary hearing required by MORRISSEY V. BREWER, supra, the Supreme Court of the United States said:

> . . . due process requires that after the arrest, the determination that reasonable grounds exist for revocation of parole should be made by someone not directly involved in the case. 408 U.S. 471, 485-86; 33 L. Ed. 2d 484, 497.

The court, in MORRISSEY V. BREWER, supra, explained that, without impugning upon the motives of the parole officer, it had to take note of the fact that

> " . . . realistically the failure of the parolee is in a sense a a failure for his supervising officer." 408 U.S. 471, 485-86; 33 L. Ed. 2d 484, 497.

IN GAGNON V. SCARPELLI (411 U.S. 778, 786; 36 L. Ed. 2d 665) the Supreme Court, perceiving no relevant due process difference between parole and probation revocations extended this same rule, that revocation of parole should be made by someone not involved in the case, established in MORRISSEY V. BREWER, supra, for parole violators to probation violators. In the case of person alleged to have violated his probation conditions, especially a first offender like the Petitioner, the above statement from

MORRISSEY, supra, would also apply to the judge who took the initial risk of placing him on probation. The probationer standing before the judge represents an error of judgment concerning defendant's potential for rehabilitation. Given the execptionally low standard of proof sufficient to revoke a probation in Georgia, (see II above), it is unfair to both the defendant and the presiding judge to expect the degree of judicial impartiality necessary to due process of law. Were this a case where the judge had presided over a jury trial that saw a guilty verdict returned, or even a case where the judge heard the case without a jury, the situation would be different. He would have presided over a proceeding to decide guilt or innocence and little else. In the instant case, however, the alleged failure of the probationer to comply with the terms of his probation directly reflect on the judge's personal decision to take the risk and put the defendant on probation.

IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER GA. CODE § 27-2727, AS APPLIED IN STATE V. WILEY, 233 Ga. 316; 210 S.E. 2d 790 (1974), WHICH DOES NOT ALLOW AS A SET-OFF TO THE SENTENCE IMPOSED AT THE PROBATION REVOCATION HEARING THE TIME PETITIONER SPENT ON PROBATION UNDER THE ORDER AND SENTENCE PRIOR TO THE REVOCATION OF A FIRST OFFENDER'S PROBATION VIOLATES THE DUE PROCESS AND EQUAL PROTECTION REQUIREMENTS OF THE FOURTEENTH (14th) AMENDMENT WHERE GA. CODE § 27-2713 GRANTS SUCH CREDIT TO PERSONS WHO ARE ON PROBATION BUT NOT UNDER THE FIRST OFFENDER PROBATION STATUTE.

The Georgia first offender probation statute is codified at Ga. Code §27-2727 through 2732. Under this act, after a verdict or plea of guilty or a plea of nolo contendere is entered, the court may withhold a formal adjudication of guilt and place the eligible defendant on probation under the Statewide Probation Act (Ga. Code §27-2702 through 2726.1). If the probationer violates the terms of his probation, the court has the authority to enter a formal adjudication of guilt "and proceed as otherwise provided. (Ga. Code §27-2727)." In other words, the first offender is placed under

the supervision of the Probation Department and treated as any other probationer would be. He is subjected to the same reporting requirements, the same conditions of probations and the same restrictions of association, recreation, and travel imposed on a probationer who has been adjudicated guilty. He and the ordinary probationer suffer the same restrictions and enjoy exactly the same conditional liberty. Upon being charged with a violation of their probation, they undergo exactly the same procedure for the revocation of probation.

However, once the decision to revoke probation is made, the first offender's status as a beneficiary of the mercy of the court is turned against him. Under Ga. Code §27-2727, " . . . upon violation of the terms of probation . . .the court may enter an adjudication of guilt and proceed as otherwise provided [emphasis supplied]." Under §27-2713, the court must credit the time served on probation to the sentence imposed after the revocation of the probation. The language of Ga. code §27-2727 would appear to intend that this be done in the case of first offenders. However, in STATE V. WILEY, supra, the Georgia Supreme Court overruled the Court of Appeals and ruled that, in the case of a first offender, the sentence is only provisional. Therefore, the court said, the trial court is free to modify its original sentence and impose any sentence allowed by law for the original crime. A subsequent opinion by Georgia's Attorney General took that decision and stated that, under it, the sentence imposed after the formal adjudication of guilt is to run from the date of revocation and formal adjudication of guilt rather than from the date of the imposition of probation and that no credit is to be given for time served on probation. Op Atty. Gen. 76-16 (1976).

WILEY's reasoning is largely limited to a series of rhetorical questions and conclusions. It appears, however, to rest upon the provisional nature of the first offender's sentence, which is a privilege granted to him by the

state. But, as was said in MORRISSEY and GRAHAM, supra, due process and equal protection cannot be denied a person merely because the state has granted a privilege. Furthermore, the benefit has been lost at this point in the proceedings. After the formal adjudication of guilt has been entered, the first offender probationer is in exactly the same position before the court as the ordinary probationer. Both have served a period of time under the supervision of the court, and both have had their probation revoked. Both have been adjudicated guilty. Yet, under the WILEY interpretation of Ga. Code §27-2727, the first offender gets no credit for the time he has served on probation, but the ordinary probationer gets credit by statute. The additional penalty exacted from the unfortunate who accepted the grace of the court and went on probation as a first offender is one exacted, not only for a breach of probation (a penalty not exacted from the ordinary probationer), but also for the mistake of choosing to be treated as a first offender. He is, in short, penalized for attempting to make a second start with the help of the court's benevolence.

As with the probation revocation procedure allowed in WARE, supra, the potential for abuse is great. Not only is the first offender subject to the single hearing and the slight evidence rule, he is also in danger of serving far more time than his exact counterpart under the usual probation system. It is instructive to compare the case of a person adjudicated guilty and sentenced to five (5) years probation on a crime that carries a maximum of ten (10) years, and the case of a defendant serving an equal probated sentence for the same crime under the first offender provision of the Georgia Code. In the case of the ordinary probationer — the one that was formally adjudicated guilty, then placed on probation -- the time he serves up to the revocation of his probation will be credited to the time served on the original sentence. As he has already been adjudicated guilty and sentence has been formally entered, it cannot be extended beyond the original five (5) year

sentence under accepted rules of criminal procedure. But in the case of a first offender, the lack of a formal adjudication of guilt in the original proceeding allows the court, upon entering the formal adjudication of guilt, to modify its original sentence and impose the maximum sentence provided by law under WILEY. Under this approach, it is possible for the first offender defendant to serve more than the maximum sentence set by law for a given crime.

With such a system at his disposal, a district attorney with a defendant on first offender status need never present the alleged offender's case to a grand jury, and need never go to trial on the second charge. With the proper set of facts, a first offender could serve up to double the time set by law for his original crime.

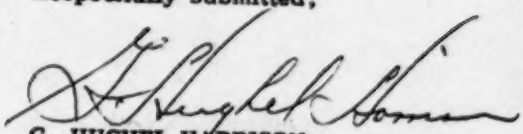
There is no rational basis for this distinction and none has ever been shown. The statute's own wording would seem to indicate a contrary intent on the part of the Georgia General Assembly. Yet this court made rule exacts a different penalty from persons distinguished only by the form of the probation being revoked. As has been recognized in MORRISSEY and GAGNON, the Petitioner has a liberty interest in a fair proceeding under the Fourteenth (14th) Amendment of the Constitution. The effect of this classification is to restrict the liberty interest of the first offender probationer to a greater degree than the infringement of the ordinary probationer's liberty interest. No compelling state interest has ever been stated by the legislature or the courts to justify such an infringement. In the absence of such showing, the distinction drawn between these two classes of probationers in the crediting of time served on probation is therefore an unconstitutional infringement of that conditional liberty given all probationers under MORRISSEY and GAGNON.

CONCLUSION

Petitioner respectfully prays that the petition for a writ of certiorari

to the Court of Appeals of the State of Georgia be granted.

Respectfully submitted,



G. HUGHEL HARRISON
Post Office Box 88
Lawrenceville, Georgia 30246
ATTORNEY FOR PETITIONER

58775. MORRIS v. THE STATE

SOGNIER, Judge.

Morris appeals the revocation of his probation by the Superior Court of Gwinnett County for the sale of cocaine. The issues raised by enumeration of error numbers 1, 3, 4 and 5 were decided adversely to appellant by this court in the case of Wilson v. State, Ga. App. (Case No. 58670, December 4, 1979); therefore, those enumerations are without merit.

In Enumeration 2 appellant contends the trial cou erred in revoking his probation. However, evidence presen at the hearing showed that on April 14, 1979 an undercover agent, acting pursuant to a tip, purchased two grams of cocaine from appellant for $220. Although appellant denie selling cocaine to the agent, the credibility of witnesses

Exhibit "A"

and weight of the evidence is for determination by the trier of fact (in this case, the trial judge). State v. Smith, 134 Ga. App. 602 (215 SE2d 345) (1975). "As to the sufficiency of the evidence [in a revocation hearing], thi court repeatedly has held that the trial judge is not boun by the same rules of evidence as a jury in passing on the guilt or innocence of the accused in the first instance. The judge is the trier of facts. He has a very wide discretion. . .only 'slight evidence' is required to authoriz revocation, and where there is any evidence supporting the prohibited criminal activity charged as a violation of the probation, this court will not interfere with the revocati of the trial court in the absence of a manifest abuse of discretion." Harper v. State, 146 Ga. App. 337, 338 (246 SE2d 391) (1978). There being no abuse of discretion in this case, the trial court did not err in revoking appellant's probation.

Judgment affirmed. McMurray, P.J. and Banke, J. concur.

Exhibit "A" (pg 2)

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta MAR 19 1980

Dear Sir:

Case No. 36152 Morris v. State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

MRS. JOLINE B. WILLIAMS, Clerk

Exhibit "B"

Court of Appeals
of the State of Georgia

ATLANTA, April 16, 1980

The Honorable Court of Appeals met pursuant to adjournment.
The following order was passed:

58775. Richard M. Morris v. The State

It is ordered that the remittitur in this case be stayed pending an application to the Supreme Court of the United States for the writ of certiorari.

Court of Appeals of the State of Georgia

CLERK'S OFFICE, ATLANTA APR 16 1980

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK

Morgan Thomas

Exhibit "C"

Cnd

NO. 79-6799

RECEIVED
SEP 27 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ORIGINAL COPY

RICHARD MICHAEL MORRIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

DARYL A. ROBINSON
Assistant Attorney General
Counsel of Record

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

QUESTION PRESENTED

Does a unified probation revocation proceeding satisfy the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution as applied in Georgia in Ga. Laws 1966, p. 440 [Ga. Code Ann. § 27-2713]?

TABLE OF CONTENTS

Page

QUESTION PRESENTED. I

STATEMENT OF THE CASE. 1

REASONS FOR NOT GRANTING THE WRIT

I. A UNIFIED PROBATION REVOCATION HEARING SATISFIES THE DUE PROCESS REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. 2

II. PETITIONER FAILED TO RAISE THE REMAINING ISSUES IN THE COURTS BELOW. 7

CONCLUSION. 8

CERTIFICATE OF SERVICE. 9

TABLE OF AUTHORITIES

Cases Cited:

Page

Cardinale v. Louisiana, 394 U.S. 437 (1969). 7

Gagnon v. Scarpelli, 411 U.S. 778 (1973). 2

Morris v. State, 153 Ga. App. 415, 265 S.E.2d 337 (1980). 1

Morrisey v. Brewer, 408 U.S. 471 (1972). 2

Stephens v. State, 245 Ga. 835, ___ S.E.2d ___, (1980) [Case No. 35921, decided May 27, 1980]. 7

Tacon v. Arizona, 410 U.S. 351 (1973). 7

United States v. Sciuto, 531 F.2d 842 (7th Cir. 1976). . 5

United States v. Tucker, 542 F.2d 77 (5th Cir. 1975). . . 5

Ware v. State, 137 Ga. App. 673, 244 S.E.2d 873 (1976). 2

Statutes Cited

Ga. Code Ann. § 27-2713. . . . . I, 2, 3

Ga. Code Ann. § 27-2727. 1

PART ONE

STATEMENT OF THE CASE

Petitioner, Richard Michael Morris, violated Georgia's Controlled Substances Act, entered pleas of guilty to two counts in the Superior Court of Gwinnett County, Georgia, and was sentenced as a first offender under Ga. Code Ann. § 27-2727. Under that statute, Petitioner's concurrent sentences of five years and one year were probated and, as a first offender, Petitioner did not have a judgment of guilt entered against him at that time.

Thereafter, Petitioner violated the conditions of probation by selling cocaine. A petition for adjudication of guilt and imposition of sentence was filed and notice was given to Petitioner and his attorney. A hearing was afforded Petitioner at which time evidence was presented establishing his guilt of the subsequent offense and at which he was afforded an opportunity to present evidence in his own behalf. After considering the evidence, the court entered an adjudication of guilt and, in effect, revoked probation.

From the adjudication of guilt and imposition of sentence Petitioner appealed to the Court of Appeals of Georgia, asserting that the trial court erred in adjudging Morris guilty and revoking probation. The convictions were affirmed in Morris v. State, 153 Ga. App. 415, 265 S.E.2d 337 (1980). The application for certiorari filed in the Supreme Court of Georgia was denied May 19, 1980. From these adverse decisions Morris petitioned this Court.

NO. 79-6799

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

RICHARD MICHAEL MORRIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART TWO

REASON FOR NOT GRANTING THE WRIT

I. A UNIFIED PROBATION REVOCATION HEARING SATISFIES THE DUE PROCESS REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner's primary argument is that a bifurcated probation revocation proceeding is required by Ga. Code Ann. § 27-2713 by virtue of this Court's holdings in Morrisey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973). Reduced to essentials, Petitioner's argument is that a preliminary hearing to establish probable cause to conduct such a revocation hearing should have preceded the evidentiary hearing. Georgia courts have determined that due process is satisfied in a single disposition by the trial court. Ware v. State, 137 Ga. App. 673, 675, 224 S.E.2d 873 (1976). In Ware the Court of Appeals held:

> Since all of these due process requirements can be satisfied in a single court trial as was done in the instant case, we see no reason for duplication in the form of a preliminary hearing. The Supreme Court's directives are met and a probationer's constitutional rights are fully protected through a single dispositional hearing where, as here, the procedure included these successive steps: (1) a petition filed by the probation supervisor in the court where the original probation sentence has been entered; (2) such petition reciting

> (a) details of the original trial including nature of the offense, defendant's plea, the court's sentence and date thereof with a copy of the terms and conditions of the probation sentence; (b) specificity as to alleged violations of the probation conditions; (c) prayer for citation, petition for revocation and for a rule to show cause; (3) consideration of the petition by trial judge and his entry of an order requiring service of a copy of the petition and a show cause ruling for a specified date, time and place in open court; (4) service of the petition and court order; (5) a full fledged hearing in accordance with Code Ann. § 27-2713; and (6) a judicial determination in writing by the court stating the particulars in which the terms of the probation had been violated and a recital as to the specific term that remains to be served.

Id. at 675. The proceedings in Morris's case satisfied the foregoing requirements. A petition was filed setting forth the particulars of the violation and specifying the probated sentence which had been violated, notice was given to Petitioner and a show cause order entered, there was a full hearing in accordance with Ga. Code Ann. § 27-2713, and the court reduced its determination of the case to writing.

Furthermore, Petitioner did not raise this procedural objection in the hearing court. On the contrary, although the petition was served on Morris and he refused to sign it or otherwise

acknowledge receipt, when asked "[I]s there any question but that he has had adequate notice. . . ?" the attorney responded "No, sir." (T. 3). The hearing court then inquired if there was any "reason why we should not proceed at this time. . .?" Again, the response was "No, sir." (T. 3). Thereafter, the state called as witnesses, among others, the police agent to whom Morris had sold the cocaine and the chemist who had tested the substance and determined it was positive for cocaine. (T. 14-15, 47).

Petitioner bases his argument on the holding in Morrisey, supra, which is made applicable to probation revocation hearings through Gagnon, supra. Petitioner contends that this Court has mandated the holding of a preliminary revocation hearing as well as a final revocation hearing. However, this argument ignores what this Court said in Morrisey: "We cannot write a code of procedure; that is the responsibility of each state. . . . Our task is limited to deciding the minimum requirements of due process." Id. at 488. Petitioner contends that the aforementioned cases establish as minimum requirements the holding of two hearings. But this Court was not concerned with the number of hearings held; the concern, then and now, is with whether a probationer is afforded that process which is due. The Court of Appeals of Georgia was cognizant of this Court's holdings when it held in Ware, supra, that the due process requirements of Morrisey could be satisfied in a single proceeding. All of the directives contained in Morrisey were followed in the single dispositional hearing which was afforded in the present case. As previously noted, the petition was filed, notice was given, an order to show cause was issued, Petitioner was present in court with counsel, a full hearing was held, and the judgment was reduced to writing; in short, Petitioner was afforded all his due process rights. In no way did the

holding of a single hearing deny Petitioner any constitutional rights to which he was entitled.

Indeed, Petitioner does not contend that minimal due process requirements were not met in the single dispositional hearing; rather, he argues that such requirements must be conducted in a two stage proceeding. However, in Morrisey, this Court in setting down the minimum due process requirements began with the proposition that revocation is not a part of the criminal prosecution; consequently, the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation. Id. at 480. "Due process is flexible and calls for procedural protections as the particular situation demands. . . Its flexibility is in its scope once it has been determined that due process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kinds of procedure. . . We have no thought to create an inflexible structure for probation revocation process. . . Control over the required proceedings by the hearing officer can assure that delaying tactics and other abuses do not occur." Id. at 481, 490.

Respondent does not dispute the fact that a probationer is entitled to some minimal inquiry reasonably soon after an arrest which subsequently leads to revocation while the information is fresh and sources are available. However, when a probationer or parolee is not being held in custody to await the revocation hearing, the reason for requiring a preliminary hearing does not exist. United States v. Tucker, 542 F.2d 77 (5th Cir. 1975); United States v. Sciuto, 531 F.2d 842 (7th Cir. 1976).

In Sciuto, the court addressed the notice argument and found that a defendant's right to reasonable notice of the nature of the charged violation and an opportunity to meet the evidence can

be satisfied by means other than a preliminary hearing. In the present case notice was provided not only to the Petitioner but to his attorney as well. In Tucker, supra, the probationer at the time of the attempted revocation was confined pursuant to a final conviction. The court held that there was no requirement for a preliminary hearing in addition to a final revocation hearing because there was no immediate loss of freedom requiring an immediate probable cause hearing.

In this case it cannot be said that the Petitioner has suffered a deprivation of an interest in liberty within the meaning of the due process clause. Although the proceedings were unified, rather than duplicative, the due process standards enunciated in Morrisey, supra, and Gagnon, supra, have been satisfied.

Petitioner has failed to demonstrate any actual prejudice, since he received adequate notice and was given a hearing within a reasonable period of time. Petitioner has the burden of proving prejudice, and he has neither asserted grounds or established prejudice. The hearing afforded him was reasonable both in time and in the evidence produced. This Court in Morrisey laid down a suggested procedure but not a restrictive one; the Court explicitly noted the need for flexibility and the responsibility for establishing such procedures which rested with the state. The single dispositional hearing held in the present case met and exceeded the minimal requirements set forth in Morrisey. To require dual hearings when a single hearing provides all the process due a probationer is to exalt form over substance and should not be the basis of granting the petition for a writ of certiorari.

II. PETITIONER FAILED TO RAISE THE REMAINING ISSUES IN THE COURTS BELOW.

Petitioner seeks to present other grounds to this Court as grounds for granting the writ. However, but for the issue previously discussed, none was raised in the courts of Georgia. This Court does not review issues presented for the first time in this manner. See, e.g., Tacon v. Arizona, 410 U.S. 351 (1973); Cardinale v. Louisiana, 394 U.S. 437 (1969).

However, the fourth contention raised by Petitioner concerning the disallowance of a set-off for time spent on probation as a first offender has been addressed recently by the Supreme Court of Georgia in Stephens v. State, 245 Ga. 835, ___S.E.2d___(1980) [Case No. 35921, decided May 27, 1980]. In Stephens, the court held "that when a probationer is sentenced to serve time in a penal institution for the offense for which he has spent time on probation, that probation time must be credited to any sentence received, including cases involving first offender probation." Id. at 837. In disallowing imposition of the entire sentence, the court noted that "[t]here is nothing in the record to indicate that Stephens was told he could get a higher sentence or that he would not be credited for time served on probation." Id. The court further stated that an accused is entitled to rely on the provisions of a sentencing document if he is not informed to the contrary when a sentence is imposed. In the instant case, whether Petitioner is entitled to a set-off under the holding in Stephens is a question that has not been but may be presented by Petitioner to the courts of Georgia. The issue has neither been raised nor considered in Petitioner's case below and is not properly presented to this Court.

The remaining allegations presented by Petitioner do not provide any basis for granting the writ of certiorari.

CONCLUSION

No sufficient reason having been presented, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

DARYL A. ROBINSON
Assistant Attorney General
Counsel of Record

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349